INDEX

	Page
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
REASONS WHY THE WRIT SHOULD NOT BE ISSUED	4
CONCLUSION	8

TABLE OF AUTHORITIES

Brown v. Commonwealth, 453 Pa. 566, 305 A. 2d 868 (Pa. 1973)	7
Caroll v. Kittle, 203 Kans. 841, 457 P. 2d 21 (Kans. 1969)	7
Dairyland Insurance Co., Inc. v. Board of County Commissioners, County of Bernalillo, 538 P. 2d 1202 (N.M. 1975)	7
Edelman v. Jordan, 415 U.S. 651 (1974)	5
Farkas v. Fulton, 51 O. App. 92, 40 O. Ops. 527, 199 N.E. 848 *aff'd*, 130 Ohio St. 390, *reh. den.* (1936)	5
Ford v. Department of Treasury, 323 U.S. 459 (1945)	5
Hagwood v. Southern, 117 U.S. 52 (1886)	6
Krause v. State, 31 Ohio St. 2d 132, 285 N.E. 2d 736 *appeal dismissed*, 409; U.S. 10052 *Reh. Den.* 410 U.S. 918 (1973)	6, 7
Kreiger v. South Oakland County Mutual Aid Pact., et al., 49 Mc A 7, 211 N.W. 2d 228 (C.A. Mich. 1973)	7

Page

Louisana v. Jummel, 107 U.S. 711 (1882) 6
Lundbeck v. State Department of Highways, 95 Ida. 459, 511 P. 2d 1325 (Ida. 1973) 7
Muskopf v. Corning Hospital District, 115 Cal. 2d 211, 350 P. 2d 457 (Cal. 1961) 7
National Labor Relations Board v. Pittsburg S.S. Co., 340 U.S. 498 (1951) 4
O'Dell v. School District of Independence, Mo., 521 S.W. 2d 403 *cert. denied* ..... U.S. ..... 96 S. Ct. 125, 46 L. Ed. 2d 94 (Mo. 1975) 7
Perkins v. State, 252 Ind. 549, 251 N.E. 2d 30 (Ind. 1969) 7
Reed v. Reed, 404 U.S. 71, at 75 (1971) 6
Reed v. Timmerman, 65 Ohio Ops. 18, 29 N.E. 2d 446 *dismissed for want of debate q.*, 137 Ohio St. 524 (1940) 5
Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955) 4
Scheuer v. Rhodes, 416 U.S. 232 (1974) 1, 3, 4, 6, 8
Smith v. Reeves, 178 U.S. 436 (1900) 6
Sousa v. State, 341 A. 2d 282 (N.H. 1975) 7
State Highway Comm. v. Utah Construction Co., 278 U.S. 194 (1928) 6
State ex rel. Board of County Commis. v. Rhodes, 88 O.L. Abs. 390, 177 N.E. 2d 557 (Mahoning Co. 1961) 5
State ex rel. Williams v. Glander, 148 Ohio St. 188 cert. denied, 332 U. S. 817 (1917) 5
Thacker v. Board of Trustees, 35 Ohio St. 2d 49 (1973) 5
Tigner v. Texas, 310 U.S. 141, at 147 (1940) 6
Wolf v. Ohio State University Hospital, 170 Ohio St. 49 (1959) 5

BLEED THROUGH

STATUTES

	Page
Civil Rights Act (42 U.S.C. Section 1983)	4
28 U.S.C. Section 1257 (3)	4, 8
Chapter 2743, Ohio Revised Code	7

RULES OF COURT

Rule 19, Rules of the Supreme Court	4

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Fourteenth Amendment	2, 3, 6
Constitution of the United States, Eleventh Amendment	4
Ohio Constitution, Article I, Section 16	6

BLEED THROUGH

IN THE

Supreme Court of the United States

No. 75-1617

JANENE RILEY, by and through
her mother and next friend
DELORES RILEY, et al.,
Petitioners,

-vs-

BETTY STEPHENS, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION OF RESPONDENTS OHIO DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION AND OHIO DEPARTMENT OF REHABILITATION AND CORRECTION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. Whether *Scheuer v. Rhodes*, 416 U.S. 232 (1974), bars the State of Ohio as the real party in interest from invoking the defense of sovereign immunity in a negligence action filed in a State of Ohio Court.

2. Whether a state court's application of the doctrine of sovereign immunity to a suit brought against the State of Ohio and County of Warren, Ohio, denies

the petitioners' right to Equal Protection and Due Process of Law guaranteed by the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

The instant action with respect to the State of Ohio respondents arose upon a complaint filed in the Court of Common Pleas of Warren County, Ohio by petitioner herein Janene Riley through her father, Robert Riley on February 18, 1972. The original complaint alleged Janene Riley had suffered personal injuries due to the negligence of Betty Stephens and John C. Daunt individually and/or jointly. Mrs. Stephens was alleged to have operated a bus on February 22, 1968 in negligent fashion thereby striking and injuring Janene Riley. Mr. Daunt was alleged to have stopped his truck suddenly thereby causing Mrs. Stephens to swerve the school bus she was operating into Janene Riley. The complaint also named the State of Ohio through Kenneth D. Gaver, M.D., Acting Director of the Department of Mental Hygiene and Correction and Roger Gove, Commissioner of Mental Retardation and its members and its County Commissioners as parties. These governmental parties were named as a result of an alleged agency or sub-agency between the entities they represented and Mrs. Stephens. Also named were Shell Oil Co., Loveland Oil Co., and Kenneth Hughes.

On May 23, 1972, the above action was consolidated with an identical case that had been filed approximately three (3) years prior to its filing by Janene Riley's mother, Delores Riley.

On April 22, 1974, after petitioners had filed a Third Amended Complaint substituting State of Ohio, Bennett J. Cooper, Director, Department of Rehabili-

BLEED THROUGH

tation and Correction for the State of Ohio, Roger Gove, Commissioner of Mental Retardation, the court sustained the State of Ohio respondents' Motion to Dismiss and the Warren County respondents' Motion for Summary Judgment on the basis of governmental immunity.

Trial of the action with respect to Betty Stephens and Loveland Oil Company was held in May, 1974 resulting in a verdict in favor of Janene Riley and Robert Riley, her father, against these parties. Such finding was reflected in a Judgment Entry dated May 13, 1974. After the court overruled Loveland Oil Company's motion for judgment notwithstanding the verdict and for new trial, an appeal was filed in the Court of Appeals, First Appellate District of Ohio.

On September 15, 1975, the Court of Appeals affirmed the judgment of the trial court. In its opinion, the Court rejected petitioners' contentions that *Scheuer v. Rhodes*, 416 U.S. 232 (1974) was applicable to the instant fact situation and that their rights to due process and equal protection under the Fourteenth Amendment to the United States Constitution had been violated.

On October 23, 1975, petitioners filed a Notice of Appeal to the Supreme Court of Ohio in the Court of Appeals. On February 5, 1976, the Ohio Supreme Court dismissed that appeal for want of a substantial constitutional question.

REASONS WHY THE WRIT SHOULD NOT BE ISSUED

Respondents State of Ohio, Department of Mental Health and Mental Retardation and State of Ohio Department of Rehabilitation and Correction do not believe the questions presented herein are sufficiently meritorious to invoke the discretion of this Court. Rule 19, Rules of the Supreme Court: *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955); *National Labor Relations Board v. Pittsburg S.S. Co.*, 340 U.S. 498 (1951). Not only have the lower state courts and Ohio Supreme Court determined that such claims are without merit, but respondents would assert that neither a federal question not previously determined by this Court nor a decision not in accord with prior applicable decisions is involved.

Petitioners' attempt at application of this Court's opinion in *Scheuer v. Rhodes*, 416 U.S. 232 (1974), to the present fact situation thus allegedly raising a jurisdictional issue pursuant to 28 U.S.C. Section 1257 (3) is misplaced. The Court of Appeals, First Appellate District of Ohio correctly held that in the present context there was no federal question necessitating any consideration of *Scheuer, supra.*

In *Scheuer v. Rhodes, supra*, this Court held that where a state official is alleged to have acted either outside the scope of his lawful authority, or if within the scope of his authority in an arbitary manner grossly abusing the lawful powers of his office, then for purposes of the complaint he is stripped of his representative capacity and is being subjected to personal liability. In the context of an action brought pursuant to the Civil Rights Act (42 U.S.C. Section 1983) neither the Eleventh Amendment nor the doctrine of

BLEED THROUGH

governmental immunity are bars to jurisdiction without some exploration of the particular facts.

The present action is not based upon the Civil Rights Act nor does the Complaint allege any violation of state or federal law, abuse of the power of one's office, or personal act or omission on the part of any state official. It is a simple negligence action in which the directors of two state agencies have been named in their official capacities and a money judgment is sought against the Treasury of the State of Ohio.

Since no federal question is raised in the complaint the law of Ohio determines whether the State of Ohio is the real party in interest. This Court's considerations in *Scheuer, supra*, in which it was determined that the plaintiffs should be permitted an opportunity to determine whether the defendants were acting lawfully is not at issue. It is the law of Ohio that although a suit may name the head of a state agency as a party where a judgment from the state treasury is sought the suit is in essence against the state. *State ex rel. Williams v. Glander*, 148 Ohio St. 188, *cert. denied*, 332 U.S. 817 (1917); *Reed v. Timmerman*, 65 Ohio Ops. 18, 29 N.E. 2d 446, *dismissed for want of debate q.* 137 Ohio St. 524 (1940); *Farkas v. Fulton*, 51 O. App. 92, 40 O. Ops. 527, 199 N.E. 848, *aff'd* 130 Ohio St. 390, *reh. den.* (1936); *State ex rel. Board of County Commis. v. Rhodes*, 88 O.L. Abs. 390, 177 N.E. 2d 557 (Mahoning Co. 1961); *Wolf v. Ohio State University Hospital*, 170 Ohio St. 49 (1959); *Thacker v. Board of Trustees*, 35 Ohio St. 2d 49 (1973).

The Ohio real party in interest test is based upon substantial precedent established by this Court. *Edelman v. Jordan*, 415 U.S. 651 (1974); *Ford v. Department of Treasury*, 323 U.S. 459 (1945); *State High-*

way Comm. v. Utah Construction Co., 278 U.S. 194 (1928); *Smith v. Reeves*, 178 U.S. 436 (1900); *Hagwood v. Southern*, 117 U.S. 52 (1886); *Louisana v. Jummel*, 107 U.S. 711 (1882).

Petitioners are unable to cite any authority for their application of *Scheuer v. Rhodes*, *supra* to the instant fact situation. Such an application would lead to a conclusion that the doctrine of sovereign immunity no longer exists. It is submitted that this Court did not intend such a result in *Scheuer*.

Petitions also support their application for the present writ on the theory that application of the doctrine of sovereign immunity results in a deprivation of their right to equal protection and due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

In addressing this issue in *Krause v. State*, 31 Ohio St. 2d 132, 285 N.E. 2d 736, *appeal dismissed*, 409 U.S. 1005̀2, *Reh. Den.* 410 U.S. 918 (1973), the Ohio Supreme Court held that Article I, Section 16 of the Ohio Constitution which provides:

> "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation shall have justice administered without denial or delay.
>
> Suits may be brought against the State in such courts and in such manner as may be provided by law",

neither is unconstitutional on its face nor as applied. Chief Justice O'Neill reasoned that it is not a deprivation of due process or equal protection to recognize by combined legislative judgment substantive differences between the conduct of private tortfeasors and governmental tortfeasors. The court relied upon two decisions of this Court; *Tigner v. Texas*, 310 U.S. 141, at 147 (1940) and *Reed v. Reed*, 404 U.S. 71, at 75 (1971).

BLEED THROUGH

The Ohio Supreme Court's rationale has been followed in other states. *Brown v. Commonwealth*, 453 Pa. 566, 305 A. 2d 868 (Pa. 1976); *Sousa v. State*, 341 A. 2d 282 (N.H. 1975); *Kreiger v. South Oakland County Mutual Aid Pact., et al.*, 49 Mc A 7, 211 N.W. 2d 228 (C.A. Mich. 1973); *Dairyland Insurance Co., Inc. v. Board of County Commissioners, County of Bernalillo*, 538 P. 2d 1202 (N.M. 1975); *Lundbeck v. State Department of Highways*, 95 Ida. 459, 511 P. 2d 1325 (Ida. 1973); *O'Dell v. School District of Independence, Mo.* 521 S.W. 2d 403, *cert. denied* ..... U.S. ....., 96 S. Ct. 125, 46 L. Ed. 2d 94 (Mo. 1975).

Petitioners cite no cases in their application for a writ which have addressed the constitutional issue and decided it favorably to their position. In fact those state courts which have judicially abrogated the doctrine of sovereign immunity have done so on public policy grounds alone. See for example: *Muskopf v. Corning Hospital District*, 115 Cal. 2d 211, 359 P. 2d 457 (Cal. 1961); *Caroll v. Kittle*, 203 Kans. 841, 457 P. 2d 21 (Kans. 1969); *Perkins v. State*, 252 Ind. 549, 251 N.E. 2d 30 (Ind. 1969). States such as Ohio have decided the sovereign immunity question on the basis of state constitutional or statutory law. See *Krause v. State, supra.* Respondents would submit that such considerations do not rise to a significant constitutional level thereby jusifying this Court to invoke jurisdiction. Petitioners' attempt at reliance upon the judicial abrogation theory and upon public policy considerations in their petition does not justify granting this writ.

Finally with respect to any alleged denial of equal protection or due process by the State of Ohio vis a vis these petitioners, respondents would point out the petition takes a contradictory position. On page 12, petitioners asserts such a deprivation. Then on page

13, they contend now that the State of Ohio legislatively has waived its immunity from suit and created a court of claims (Chapter 2743, Ohio Revised Code), they have a cause of action therein.

CONCLUSION

In summary, respondents Ohio Department of Mental Health and Mental Retardation and Ohio Department of Rehabilitation and Corrections believe this case presents no special and important reasons justifying this Court to invoke its jurisdictions under 28 U.S.C. Section 1257(3). There is no federal question herein requiring application of *Scheuer v. Rhodes, supra.* Petitioner's equal protection and due process issues have been uniformally rejected by state courts considering them in the context of the sovereign immunity doctrine. Abrogation of a sovereign immunity defense is a problem that should be addressed solely by courts of the states on public policy considerations or application of state law. For these reasons, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM J. BROWN
Attorney General

LEO J. CONWAY
GEORGE STRICKER, JR.
Assistant Attorneys General
State Office Tower
30 East Broad Street
Suite 1513
Columbus, Ohio 43215
(614) 466-5414

BLEED THROUGH

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Brief were forwarded to Leo J. Breslin, Esq., Attorney for Petitioners, 1200 American Building, Cincinnati, Ohio 45202 and three (3) copies to Edward T. Utz, Esq., Attorney for Respondent, Warren County Board of Mental Retardation, 4th and Walnut Building, Cincinnati, Ohio 45202, this ..... day of ....., 1976 via the United States Postal Service.

LEO J. CONWAY
Assistant Attorney General